Supreme Court, U.S.
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No. 09-

IN THE
Supreme Court of the United States

VINNIE BILOTTO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit and the United States District Court have, in failing to follow the "law of the case," so significantly "departed from the accepted and usual course of judicial proceedings" that this Court should exercise its supervisory powers under Rule 10 of the Supreme Court Rules and grant this writ.

2. Whether the United States Court of Appeals for the Fifth Circuit failed to follow *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003), and *Sonnier v. Johnson,* 161 F.3d 941, 944 (5th Cir. 1998), in denying a certificate of appealability because, resolving doubt in favor of Petitioner, and based on a limited, threshold inquiry concerning the merits of Petitioner's claims he received ineffective assistance of counsel at trial, theses claims are debatable among reasonable jurists and adequate to deserve encouragement to proceed further.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Vinnie Bilotto:	Petitioner
United States of America:	Respondent

TABLE OF CONTENTS

QUESTION PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii-iv

TABLE OF AUTHORITIES.....v-vii

OPINIONS AND RELEVANT ORDERS.....1-2

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS.....3-5

STATEMENT OF THE CASE.....5-7

ARGUMENTS.....7-28

CONCLUSION.....28

INDEX TO APPENDIX

Order of Court of Appeals (denying Petitioner's Motion for Reconsideration).....App. 1a-2a

Single-Judge Order (denying request for COA).....App. 3a-5a

Order of Federal District Court
Accepting Memorandum and
Recommendation (denying COA).....App. 6a-7a

Memorandum and
Recommendation of United States
Magistrate Judge
(recommending COA be denied).....App. 8a-11a

Judgment In A Civil Case
Entered by Federal District Clerk.....App. 12a-13a

Order of Federal District Court
Accepting Memorandum and
Recommendation of United States
Magistrate Judge
(denying habeas relief).....App. 14a-15a

Memorandum and
Recommendation of United States
Magistrate Judge (recommending
habeas relief be denied).....App. 16a-37a

Order of Court of Appeals
denying relief on direct appeal.....App. 38a-47a

TABLE OF AUTHORITIES

CASES:

Arizona v. California,
460 U.S. 605, 618 (1983).....12

Christianson v. Colt Indus. Operating Corp.,
486 U.S. 800, 815-16 (1988).....12, 13

Fogel v. Chestnutt,
668 F.2d 100, 109 (2d Cir. 1981).....13

Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir.),
cert. denied, 522 U.S. 963 (1997).....11

Lockhart v. Fretwell,
506 U.S. 364, 372 (1993).....10

Miller-El v. Cockrell,
537 U.S. 322 (2003).....7, 10, 11, 28

Slack v. McDaniel,
529 U.S. 473, 484 (2000).....11

Sonnier v. Johnson,
161 F.3d 941, 944 (5th Cir. 1998).....7, 11, 28

Stephens v. Hall, 294 F.3d 210, 218 (1st Cir. 2002),
cert. denied, 537 U.S. 1129 (2003).....16

Strickland v. Washington,
466 U.S. 668, 687 (1984).....10, 19

Tennard v. Dretke,
542 U.S. 274, 282 (2004).....11

United States v. Bilotto,
245 Fed.Appx. 410 (5th Cir. 2007).....2, 5, 21

Whitehead v. Johnson,
157 F.3d 384, 386 (5th Cir. 1998).....11

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. VI.....3, 10

STATUTES:

28 U.S.C. § 1254(1).....2

28 U.S.C. § 2253(c).....4, 11

28 U.S.C. § 2255.....3, 4, 6, 22,27

OTHER AUTHORITIES:

SUP. CT. R. 13.....2

SUP. CT. R. 10.....7, 8, 9

PETITION FOR WRIT OF CERTIORARI

Petitioner, Vinnie Bilotto, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit denying the issuance of a Certificate of Appealability on Petitioner's claims of ineffective assistance of counsel.

CITATIONS TO THE OPINIONS AND RELEVANT ORDERS

The Order (App. 1a-2a) of the United States Court of Appeals for the Fifth Circuit (sometimes referred to as "the Court of Appeals") denying Petitioner's motion for reconsideration of the single-Judge Order denying Petitioner's request for a COA is not published. *United States v. Bilotto,* No. 08-51227 (5th Cir. Dec. 18, 2009).

The single-Judge Order (App. 3a-5a) denying Petitioner's request for a COA is not published. *United States v. Bilotto,* No. 08-51227 (5th Cir. Nov. 10, 2009).

The Order Accepting Recommendation of Magistrate Judge (App. 6a-7a) denying Petitioner's request for a COA is not published. *Bilotto v. United States*, 5:04-CR-343-OLG (W.D. Tex. Jan. 30, 2009).

The Memorandum and Recommendation (App. 8a-11a) of the United States Magistrate Judge recommending denial of Petitioner's request for a COA is not published. *Bilotto v. United States,* 5:04-CR-343-OLG (W.D. Tex. Dec. 30, 2008).

The Judgment In A Civil Case (App. 12a-13a) issued by the Office of the District Clerk is not published. *Bilotto v. United States,* 5:04-CR-343-OLG (W.D. Tex. Oct. 29, 2008).

The Order Accepting Recommendation of Magistrate Judge (App. 14a-15a) and denying Petitioner's request for habeas relief is not published. *Bilotto v. United States,* 5:04-CR-343-OLG (W.D. Tex. Oct. 29, 2008).

The Memorandum and Recommendation (App. 16a-37a) recommending that Petitioner's request for habeas relief be denied is not published. *Bilotto v. United States,* 5:04-CR-343-OLG (W.D. Tex. Sept. 24, 2008).

The Order (App. 38a-47a) of the United States Court of Appeals for the Fifth Circuit denying relief on direct appeal was not designated for publication, *United States v. Bilotto,* No. 06-50587 (5th Cir. Dec. 18, 2007), but can be found at *United States v. Bilotto,* 245 Fed.Appx. 410, 412 (5th Cir. 2007).

GROUNDS FOR JURISDICTION

The single-Judge Order of the Court of Appeals denying Petitioner's application for a COA issued on November 10, 2009. (App. 3a-5a). The Order of the three-Judge Panel denying Petitioner's motion for reconsideration issued on December 18, 2009. (App. 1a-2a). This Petition for Writ of Certiorari is due for filing on or before March 18, 2010. SUP. CT. R. 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have Assistance of Counsel for his defense.

28 U.S.C. § 2255(a)

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to imposed such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2253(c)

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing as required by paragraph (2).

STATEMENT OF THE CASE

Petitioner was found guilty by a jury on October 25, 2005, of four counts of mail fraud in violation of 18 U.S.C. § 1341 for his role in procuring two "key person" life insurance policies. (App. at 16a-17a). On April 13, 2006, he was sentenced to serve fifteen months in prison on each count, to be served concurrently, to be followed by a supervised release term of three years. *Id.* at 17a. On direct appeal to the United States Court of Appeals for the Fifth Circuit, Petitioner alleged: (1) insufficient evidence supported the verdict;

(2) the District Court improperly limited his ability to cross-examine witnesses; (3) the District Court denied him a fair trial by disparaging his counsel in front of the jury; (4) the District Court erroneously refused to give a good faith jury instruction; (5) the District Court improperly admitted irrelevant and unfairly prejudicial evidence; and (6) the cumulative effect of the errors made at trial, even if individually harmless, required reversal. *Id.*

Although Petitioner's conviction was affirmed, *id.* (citing *United States v. Bilotto*, 245 Fed.Appx. 410 (5th Cir. 2007)), the Court of Appeals found that defense counsel had questioned Karen Hathaway, the Government's key witness, in a "confusing way" and had "failed to meaningfully use [the] opportunity" to cross-examine this witness. *Id.* at 42.

The motion to vacate sentence before the District Court was filed March 24, 2008. *Id.*

Petitioner was convicted of using the mail to carry out a fraudulent scheme to collect proceeds of two insurance policies, one with Farmers New World Life Insurance Company ("Farmers") and one with Metropolitan Life Insurance Company ("MetLife"), after the death of the insured, Donald Taylor. (App. at 17a). Both Farmers and MetLife issued "key person" term life insurance policies which generally allow employers to insure key persons for up to five times their annual salary. *Id.* Key persons are those individuals whose untimely death would cause a business to experience a measurable loss to continued profitability. *Id.* at 17a-18a.

Petitioner was the owner of business entities named Allstate Outdoor Displays and Allstate Property Management. *Id.* at 18a. According to the

superseding indictment, Petitioner made materially false representations in the policy applications upon which Farmers and MetLife relied, and he caused the mail to be used to submit the applications and to receive the policy proceeds. *Id.*

In his 28 U.S.C. § 2255 motion to vacate sentence, Petitioner argues his attorney, Ray Taylor, rendered ineffective assistance of counsel (1) by failing to meaningfully use the opportunity to impeach the government's key witness; (2) by arguing to the jury that Petitioner was untruthful and could not be trusted; (3) by failing to introduce crucial evidence that Petitioner purchased a long-term policy because he believed he was investing in the long life of Donald Taylor; (4) by failing to effectively prepare and present the case at trial; and (5) based on the totality of the representation. *Id.* at 18a.

On September 24, 2008, the United States Magistrate Judge issued a Memorandum and Recommendation recommending to the District Court that Petitioner's 28 U.S.C. § 2255 motion to vacate sentence be denied. (App. at 16a, 35a). The District Court accepted this recommendation and denied the petition for writ of habeas corpus over Petitioner's objections on October 29, 2008. *Id.* at 14a-15a. A final Judgment in a Civil Action was entered by the Office of the District Clerk on the same day and the case was closed. *Id.* at 12a-13a.

Petitioner filed a notice of appeal and an application for a COA seeking an Order which would allow him to appeal the decision of the District Court denying his request for a COA. *Id.* at 8a. On December 30, 2008, the Magistrate Judge issued a Memorandum and Recommendation recommending to

the District Court that Petitioner's application for a COA be denied. *Id.* at 10a. The District Court accepted this recommendation and denied the request for a COA over Petitioner's objections on January 30, 2009. *Id.* at 7a.

On appeal before the United States Court of Appeals for the Fifth Circuit, a single-Judge issued an Order denying Petitioner's motion for a COA. (App. at 3a-5a). Petitioner filed a motion for reconsideration, which was denied by a three-Judge panel on December 18, 2009. *Id.* at 1a-2a.

It is from the denial of Petitioner's motion for reconsideration which he respectfully seeks a Petition for Writ of Certiorari from this Honorable Court. Petitioner contends the United States Court of Appeals for the Fifth Circuit and the United States District Court have, in failing to follow the "law of the case," so significantly "departed from the accepted and usual course of judicial proceedings" that this Court should exercise its supervisory powers under Supreme Court Rule 10 and grant this writ. Petitioner also respectfully submits that the United States Court of Appeals for the Fifth Circuit failed to follow *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003), and *Sonnier v. Johnson,* 161 F.3d 941, 944 (5th Cir. 1998), in denying a certificate of appealability because, resolving doubt in favor of Petitioner, and based on a limited, threshold inquiry concerning the merits of Petitioner's claims he received ineffective assistance of counsel at trial, theses claims are debatable among reasonable jurists and adequate to deserve encouragement to proceed further.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
Overview of Reasons Under Supreme Court Rule 10 for Allowance of the Writ

A.
The Principal Assertion of Legal and Factual Errors at Trial

Although other arguments are made, the principal assertion in this petition involves defense counsel's failure to effectively impeach the Government's key witness, Karen Hathaway. Given the ruling of the Court of Appeals on direct review that defense counsel did fail effectively to impeach this crucial witness, this assertion does not involve resolution of a factual dispute. Nor does Petitioner seek some clarification or resolution of an application of the law to the facts. Indeed, this ineffective assistance of counsel claim does not seek a reversal or modification of the substantive laws controlling the previous rulings in this case. Instead, the relief sought is that the central and most important legal and factual basis for the ruling on direct appeal should be enforced, and not changed, set aside, or rendered inapplicable, in this ineffective assistance claim brought in this writ of habeas corpus. In other words, Petitioner respectfully submits that a distinct and specific holding on a critical issue before the Court of Appeals should be enforced in all subsequent litigation in the case. Such a procedure is mandated by the well established principles of law discussed below. For

these reasons and those discussed herein, Petitioner respectfully requests that this Honorable Court grant this petition.

B.

The Applicable Well Established Standards for Writ Review

Rule 10 of the Supreme Court Rules sets the standard for determination of whether this petition should be granted. This Rule, and its predecessors, defines the limitation for the exercise of judicial discretion on appeal to this Court. *Id.* In addition to the designations of specific matters for review, i.e., a split in the Circuits, Rule 10 also provides the standards for consideration by this Court in the determination of whether review should be granted. *Id.* Applicable to this case is section (a) of Supreme Court Rule 10, which permits the granting of a petition when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory powers." Petitioner respectfully submits that the United States Court of Appeals for the Fifth Circuit and the federal District Court have so significantly "departed from the accepted and usual course of judicial proceedings" that this Court should exercise its supervisory powers and grant this writ. SUP. CT. R. 10(a).

II.
Expanding the Basis for Granting the Petition

A.
Ineffective Assistance of Counsel

Effective assistance of counsel is a right guaranteed by the Sixth Amendment of the United States Constitution. U.S. CONST. amend. VI. To obtain habeas relief on his claims of ineffective assistance of counsel, the habeas applicant must demonstrate that his counsel was deficient and that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish his counsel's performance was constitutionally deficient, the habeas applicant carries the burden of proof to show counsel's performance fell outside the range of reasonable professional assistance. *Id.* at 689-91. A habeas applicant must also show that counsel's deficient performance prejudiced the defense. *Id.* at 692. Specifically, the habeas applicant must prove counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

B.
The Legal Standard for Granting a COA

Petitioner must obtain a COA as a "jurisdictional prerequisite" to appealing the District Court's denial of habeas relief. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA will be granted only if Petitioner makes "a substantial showing of the

denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke,* 542 U.S. 274, 282 (2004). Because the District Court rejected Petitioner's constitutional claims on the merits, Petitioner must show "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El,* 537 U.S. at 336 (citing *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). In making a COA determination, the Court conducts a "threshold inquiry" consisting of "an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Finally, in the Fifth Circuit, any doubt as to whether a COA should issue must be resolved in favor of the petitioner. *Sonnier v. Johnson,* 161 F.3d 941, 944 (5th Cir. 1998) (citing *Whitehead v. Johnson,* 157 F.3d 384, 386 (5th Cir. 1998); *Fuller v. Johnson,* 114 F.3d 491, 495 (5th Cir.), *cert. denied,* 522 U.S. 963 (1997)). Petitioner respectfully submits that, resolving doubt in his favor, and based on a limited, threshold inquiry concerning the merits of his ineffective assistance of counsel claims, a COA is warranted because these claims are debatable among reasonable jurists and deserve encouragement to proceed further.

C.
The "Law of the Case" Doctrine

As discussed throughout this petition, it is Petitioner's position that the Court of Appeals has directly addressed the adjudication of defense counsel's failure to properly cross-examine the Government's key witness with prior inconsistent statements. More specifically, the United States Court of Appeals for the Fifth Circuit held that, despite being allowed to question this witness " about anything under the sun," defense counsel failed to "meaningfully use [the] opportunity" to impeach Karen Hathaway. (App. at 42a). Based on this conclusion, Petitioner asserted in his habeas petition that his trial attorney was ineffective for failing to meaningfully impeach the Government's key witness. *Id.* at 18a.

The legal basis for this contention was, and still is, the "law of the case" doctrine. *Id.* at 21a. "As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (quoting *Arizona*, 460 U.S. at 618). "A court has the power to revisit prior decisions of its own . . . in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Arizona*, 460 U.S. at 618, n.8; *see also Christianson*, 486 U.S. at 817 (quoting *Arizona*, 460 U.S. at 618 n.8). Additionally, "[t]he law of the

case will be disregarded only when the court has 'a clear conviction of error.'" *Christianson*, 486 U.S. at 819 (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981)). Accordingly, Petitioner respectfully submits the holding of the Court of Appeals on direct appeal on the issue of impeachment of Karen Hathaway, the Government's key witness against Petitioner, should be enforced with equal vigor on the writ of habeas corpus.

D.

Further Discussion on the Issue of the Failure to Meaningfully Impeach Karen Hathaway[1]

1.

The Argument

This claim involves the defense attorney's failure to meaningfully use the opportunity to impeach the Government's key witness, Karen Hathaway. (App. at 18a). As noted above, Petitioner was convicted of mail fraud for his role in procuring two "key person" life insurance policies on one of his employees, Donald Taylor. *Id.* at 17a-18a. In this regard, "Karen Hathaway testified that in filling out

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[1] With respect to the issue of ineffective assistance of counsel and a COA, the Magistrate Judge provided the factual and legal basis for the decisions to deny relief and deny a COA. (App. at 8a-11a; 16a-37a). Neither the federal District Court nor the Court of Appeals expanded on the specific reasons for the denials. *See id.* at 3a-5a; 6a-7a; 14a-15a. Accordingly, Petitioner focuses on the Memorandum(s) and Recommendation(s) of the Magistrate Judge, which were accepted, and, for practical purposes, endorsed by the other Courts.

the insurance form, Bilotto provided her information about Donald Taylor." *Id.* at 40a. She said Petitioner supplied her with information regarding Donald Taylor's employment by phone, and that Donald Taylor had provided her with information about his health, also over the telephone. (3 T.R. 304-05, 310-11).[2] Petitioner testified that Karen Hathaway had mailed him a blank form, that he and Donald Taylor had signed the form in San Antonio, and then sent it back to Karen Hathaway in New Mexico so she could fill in the necessary information. (5 T.R. 904). This became essential to the Government's case because some of the information contained in the application regarding Donald Taylor's employment "was obviously false." (App. at 41a).

Importantly, defense counsel possessed "an allegedly inconsistent prior statement [Karen Hathaway] made regarding whether Bilotto had helped her fill out the key person insurance form." *Id.* The District Court nonetheless "restricted the flow of questioning regarding what Hathaway had said" partly "because of the confusing way in which defense counsel questioned her." *Id.* at 41a-42a. This restriction notwithstanding, the District Court nevertheless gave defense counsel "an opportunity to cross-examine Hathaway on her statement, stating that he could ask her 'anything under the sun.'" *Id.* at 42a (emphasis added) (quoting District Court Judge). However, as the Court of Appeals expressly found in regard to the main basis for denying a claim based on the District Court's handling of the impeachment

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[2] "__ T.R. ___" refers to the volume and page number of the trial record.

evidence, defense counsel "did not meaningfully use that opportunity" to impeach Karen Hathaway. *Id.*

Hence, Petitioner submits in this claim that defense counsel's performance in failing to properly impeach Karen Hathaway, the Government's key witness, was deficient. Petitioner further submits that he was prejudiced by this deficient performance because the result of the trial would have been in all reasonable probability different had counsel properly impeached this witness on the elements necessary to convict Petitioner of mail fraud. Accordingly, as set forth below, Petitioner contends defense counsel was ineffective.

It was crucial to the Government's case and Karen Hathaway's testimony that she was believable when she declared the employment information was provided by Petitioner and not by a Mr. Donald Taylor. (3 T.R. 304-11); see also (App. at 39a)(declaring that Government had burden to show Petitioner intended to defraud). It is this declaration which was contrary to her recorded statement that Petitioner did not provide any information for the application. (3 T.R. 236-37). Rather, it was a man who represented himself as Donald Taylor who provided the information to Karen Hathaway for the application. *Id.* Based on this evidence, and the lack of any impeachment with the taped statement, Petitioner argued on direct appeal that the District Court erred by limiting the introduction of this impeachment evidence. (App. at 41a). However, the United States Court of Appeals for the Fifth Circuit disagreed. *Id.* at 41a-43a. Petitioner submits the explanation by the Court of Appeals for its ruling establishes that defense counsel's performance was deficient with respect to the

impeachment at issue. *Id.* As stated in the Court's opinion on direct appeal, despite the District Court's permission to inquire about "anything under the sun," defense counsel's examination of Karen Hathaway was confusing. *Id.* at 42a. In fact, "defense counsel did not "meaningfully use [the] opportunity" to impeach Karen Hathaway. *Id.* Hence, Petitioner respectfully submits that defense counsel's performance was deficient with respect to the impeachment of Karen Hathaway. Thus, prejudice is the only issue which remains to be addressed.

Petitioner respectfully submits he was prejudiced as a result of defense counsel's failure to effectively use the opportunity to impeach the Government's crucial witness while the prosecution pursued its quest for a guilty verdict. Regarding the specific claim of ineffective assistance of counsel based on failure to impeach a government witness, courts determine prejudice by considering (1) the strength of the prosecution's case; (2) the effectiveness of the defense absent the impeachment evidence; and (3) the potential impeachment value of the evidence not introduced. *Stephens v. Hall,* 294 F.3d 210, 218 (1st Cir. 2002), *cert. denied,* 537 U.S. 1129 (2003).

Regarding the strength of the prosecution's case and the effectiveness of Petitioner's defense absent the impeachment evidence, Karen Hathaway's credibility, or lack thereof, was central both to the Government's case and to Petitioner's defense. Specifically, defense counsel failed to effectively attack the credibility of the government's star witness who testified against Petitioner. Indeed, Karen Hathaway was not just the key witness, she was the only witness who testified that Petitioner sought out a key person policy.

Moreover, Karen Hathaway was the only witness who testified that Petitioner was the one who supplied Donald Taylor's employment information. Thus, in the absence of her statements on the stand, the Government would have had no testimony to prove the essential elements of the alleged crime. In this regard, the impeachment of Karen Hathaway was the heart of, and therefore crucial to, the effectiveness of Petitioner's defense.

Regarding the potential impeachment value of the evidence not introduced, defense counsel failed to use a logical questioning format establishing that Petitioner did not provide Karen Hathaway with information about Donald Taylor when filling out the insurance form. This performance failed to reasonably communicate to the jury the weakness of the testimony of the Government's key witness on an essential element of the crime of which Petitioner was ultimately convicted. By failing to effectively use the opportunity to meaningfully impeach the reliability of Karen Hathaway's testimony, Petitioner respectfully submits that defense counsel argued against his client and in favor of a conviction in no uncertain terms, thereby depriving Petitioner of the right to counsel guaranteed by the United States Constitution.

Notably, Petitioner's claim that a meaningful impeachment would have yielded a different result is not speculative. The Court of Appeals itself alleged facts which could have been elicited using a more effective form of impeachment. (App. at 42a). Specifically, the Appellate Court noted the District Court appeared to restrict only the "actual physical use of the transcript," and pointed out that counsel could have questioned Karen Hathaway about

"anything under the sun" regarding what she had said. *Id.*

In sum, the United States Court of Appeals for the Fifth Circuit made it clear that defense counsel had information available to him with which he could have effectively impeached Karen Hathaway, but he failed to do so. *Id.* Indeed, the cross-examination of Karen Hathaway was crucial to impeaching her credibility and, because she was the only witness who testified that Petitioner had taken out a fraudulent key person insurance policy on Donald Taylor, the result of the trial would in all reasonable probability have been different had counsel conducted a proper cross-examination through meaningful impeachment.

2.

The Memorandum and Recommendation of the Magistrate Judge Addressing the Merits of this Claim

The Magistrate Judge disagreed with Petitioner's argument that defense counsel was ineffective with regard to his examination of Karen Hathaway. The Magistrate Judge described Petitioner's claim in the following fashion:

> Bilotto contends that the Court of Appeals, in its decision on appeal, found that Ray Taylor was ineffective in his cross-examination of Karen Hathaway. That Court rendered no such finding.

(App. at 24a). The Magistrate Judge also determined that "the record shows that Ray Taylor made several efforts to impeach Karen Hathaway with the statement made to McKay." *Id.* at 24a. The

Magistrate Judge further disagreed with the determinations of the United States Court of Appeals for the Fifth Circuit that defense counsel's questioning of Karen Hathaway regarding the allegedly inconsistent statement was confusing and that defense counsel had failed to meaningfully use the opportunity to impeach Karen Hathaway with the statement she made to Mr. McKay. *Id.* Accordingly, the Magistrate Judge recommended relief on this claim be denied. *Id.*

3.

Petitioner's Response to the Recommendation

Regarding the characterization of this claim by the Magistrate Judge, Petitioner respectfully submits that he did not, and does not, argue that the Court of Appeals found that defense counsel was ineffective in his cross-examination of Karen Hathaway. Instead, Petitioner argues, as he did to the lower Courts, that the findings of the United States Court of Appeals for the Fifth Circuit that (1) defense counsel "did not meaningfully use" the opportunity to question Karen Hathaway on the alleged prior inconsistent statement; and (2) the District Court restricted "the flow of questioning regarding what Hathaway had said –in part because of the confusing way in which defense counsel questioned her," support a determination that defense counsel was ineffective under the principles set forth in *Strickland*. Petitioner further submits that the fact that defense counsel attempted to impeach Karen Hathaway does not mean that he rendered effective assistance. In other words, Petitioner respectfully submits that an attempt to impeach is not enough to render defense counsel's

performance effective. As noted by the Magistrate Judge, defense counsel did not ask Karen Hathaway any questions about the conversation she had with Mr. McKay on cross-examination. (App. at 22a). The prosecution was thus able to present crucial defensive evidence to the jury for the first time in a way which was favorable to the Government. On re-cross, although the District Court allowed defense counsel to question Karen Hathaway about "anything under the sun," his questions were confusing and he failed to "meaningfully use the opportunity" to effectively impeach Karen Hathaway about her alleged prior inconsistent statement. (App. at 41a-42a).

The Magistrate Judge next disagreed with the finding of the Court of Appeals that defense counsel failed to meaningfully use the opportunity to impeach Karen Hathaway and that his questions were confusing. *Id.* at 24a. The Magistrate Judge opined:

> With due respect to the dicta in the opinion of the Court of Appeals, this Court finds that the questioning of Hathaway by Bilotto's attorney regarding the allegedly inconsistent statement was not confusing. The record does not support a conclusion that he failed to meaningfully use the opportunity to impeach Hathaway with the statement she made to McKay. Counsel's performance in this regard was not deficient.

Id. Petitioner respectfully submits the prior findings of the Court of Appeals on direct appeal constitute "the law of the case" and foreclose any challenge based on the same issue. *United States v. McCollom,* 664 F.2d

56, 59 (5th Cir. 1981), *cert. denied,* 456 U.S. 934 (1982).

The law of the case doctrine does not reach a matter stated in dicta which was not presented for decision and was not decided. *Muncy v. City of Dallas,* 123 Fed. Appx. 601, 606 (5th Cir. 2005). However, the question of defense counsel's cross-examination of Karen Hathaway was addressed on direct appeal when the Court of Appeals considered whether the District Court unreasonably limited and ultimately denied his attempts to impeach Karen Hathaway. (App. at 41a-42a) (denying on direct appeal Petitioner's claim that District Court unreasonably limited and ultimately denied his attempts to impeach Karen Hathaway because "[d]efense counsel did not meaningfully use that opportunity [referring to the opportunity to meaningfully impeach Karen Hathaway] but, the opportunity is all that the law requires"). Accordingly, Petitioner respectfully submits the findings of the United States Court of Appeals for the Fifth Circuit in this regard are not dicta, but constitute the law of the case.

Alternatively, Petitioner submits that defense counsel did fail to effectively use the opportunity to impeach Karen Hathaway and his line of questioning was confusing. He started, stopped, began again, and was restricted and then foreclosed from proceeding with his cross-examination by the District Judge. *See* (App. at 23-24a) (reciting facts surrounding defense counsel's attempt to impeach Karen Hathaway). Petitioner therefore respectfully contends the record does support a finding that defense counsel failed to effectively impeach Karen Hathaway.

Finally, the Magistrate Judge found that Petitioner has not shown prejudice because he has never established that Karen Hathaway's statement to Mr. McKay was, in fact, inconsistent. Petitioner respectfully submits that it was within the jury's province to determine, following an effective cross-examination of Karen Hathaway, whether the statement was inconsistent. As discussed above, Karen Hathaway's testimony was all-important in this case wherein the government had the burden to show that Petitioner intentionally defrauded the insurers. Petitioner respectfully maintains that he has shown he was prejudiced by his attorney's deficient performance and there is a reasonable probability the result of the trial would have been different had defense counsel effectively impeached Karen Hathaway regarding the source of information for the insurance application. For these and the reasons set forth above, Petitioner contends counsel rendered ineffective assistance when he failed to meaningfully use the opportunity to effectively cross examine Karen Hathaway.

Petitioner concedes the Magistrate Judge did not agree with Petitioner's arguments and the District Court accepted the recommendation that Petitioner's motion to vacate be denied. Petitioner also concedes that the Court of Appeals denied Petitioner's request for a COA. However, for purposes of these proceedings, Petitioner respectfully submits that he has made a substantial showing of the denial of his constitutional right to effective assistance of counsel such that reasonable jurists could debate whether his 28 U.S.C. § 2255 motion should have been granted and the issues presented on this claim are adequate to deserve encouragement to proceed further.

Specifically, Petitioner respectfully submits that whether defense counsel rendered ineffective assistance when he failed to meaningfully use the opportunity to impeach the prosecution's key witness is an issue which is debatable among reasonable jurists and which is adequate to deserve encouragement to proceed further. Petitioner contends this is especially true where the Court of Appeals has already held that defense counsel failed to meaningfully take advantage of the opportunity to impeach the heart of the prosecution's case. Petitioner therefore respectfully requests that this Honorable Court exercise its discretionary and supervisory powers and grant this petition for certiorari so he may proceed with this claim before the United States Court of Appeals for the Fifth Circuit.

E.

It is Debatable Whether Defense Counsel's Performance, as a Whole, was Deficient and Prejudiced Petitioner

In addition to defense counsel's failure to meaningfully use the opportunity to impeach the Government's key witness, Petitioner respectfully submits that defense counsel's performance was deficient in other areas and that these errors, when considered in conjunction with the impeachment error, were ultimately prejudicial to Petitioner's defense.

During the trial of this case, defense counsel argued that Petitioner was not an honest man and that he could not be trusted. (7 T.R. 38, 49, 50-51). Counsel did so at closing argument on three separate occasions, *id.*, in this case where his intent was a

critical element of the Government's case. (App. at 39a) (noting Government had burden to prove Petitioner intended to defraud insurance companies in order to obtain conviction).

Defense counsel also failed to admit what Petitioner contends is crucial evidence that Petitioner purchased a twenty-year policy because he believed he was investing in the long life of Donald Taylor. *Id.* at 28a-29a.

It is also true that defense counsel was having trouble hearing the proceedings. He announced "I'm deaf" when he could not hear during voir dire, (1 T.R. 95), and acknowledged numerous other times during trial that he was having trouble hearing. (1 T.R. 125, 154-55); (2 T.R. 57, 73); (4 T.R. 562, 563, 579, 617, 690); (5 T.R. 780, 791); (6 T.R. 995). At other times during the proceedings, counsel spoke so low that neither the Court (4 T.R. 576) nor the witness (5 T.R. 740) could hear him. In another instance, defense counsel complained that the prosecutor's voice level was too loud. (5 T.R. 932).

Defense counsel also became confused as to what exhibit was in play (2 T.R. 39), forgot his line of questioning (5 T.R. 830), and needed the Judge to instruct him as to how to proceed with cross-examination (5 T.R. 830). He sought clarification as to what was happening more than once. (2 T.R. 30); (4 T.R. 551). Defense counsel further announced in open court that he was fatigued. (5 T.R. 832). He additionally apologized to witnesses for making mistakes. (2 T.R. 63, 76). Defense counsel also cut-off at least one witness in the middle of his answers. (4 T.R. 579).

Moreover, the District Court appeared to become frustrated with counsel's manner of questioning the witnesses. (3 T.R. 270, 308-12, 382, 384, 385-86). At times, the Judge had to interject himself into a witness's cross-examination to clarify the witnesses' testimony. (App. at 41a-42a). The Judge also appeared to become frustrated when counsel gave vague answers to the Court's questions. (3 T.R. 321). When the defense failed to have its witnesses present to testify, the District Judge declared "that's terrible." (4 T.R. 557).

As discussed, the District Judge also restricted the flow of defense counsel's cross-examination of the government's key witness in this case, Karen Hathaway, at least in part, "because of the confusing way in which defense counsel questioned her." (App. at 42a). Defense counsel's performance also caused the District Judge to limit cross-examination of other important government witnesses, (3 T.R. 386-448); (4 T.R. 509-633), and insurance company officials. (3 T.R. 363-86).

On direct appeal, Petitioner argued that defense counsel's overall conduct further caused the District Judge to make "several sarcastic comments" in front of the jury. (App. at 44a). The attorney, arguendo, additionally made himself the subject of jokes made by the District Court. *Id.* (noting that exchanges between defense counsel and District Judge "seem to have been taken as jokes at the time"). Things even deteriorated to the point where defense counsel presumed that when the prosecutor made a joke, it was necessarily on him. (5 T.R. 810).

Petitioner respectfully submits that defense counsel's performance was deficient. The District

Court limited and ultimately denied his attempts to impeach Karen Hathaway with an allegedly inconsistent prior statement she made regarding whether Petitioner had helped her fill out the key person insurance form "in part, because of the confusing way in which defense counsel questioned her; he failed to meaningfully impeach Karen Hathaway, the government's key witness on a topic which would have shown the witness was untruthful on the very issue which lead to Petitioner's conviction. (App. at 42a-43a) (holding that defense counsel's questions were confusing and that he failed to "meaningfully use [the] opportunity" to impeach Karen Hathaway, the government's key witness who was offered to prove Petitioner had "the specific intent to defraud," an element the government had to show to prove Petitioner committed mail fraud in violation of 18 U.S.C. § 1341). Defense counsel made remarks at closing argument which were attacks on his client's truthfulness in a case where his honesty was the principle issue. It is disputed whether defense counsel omitted crucial evidence of Petitioner's decision to purchase twenty years of insurance coverage on Donald Taylor. This evidence would have shown Petitioner chose extended coverage because he believed Donald Taylor was an essential employee for the long-term of his business rather than, as the prosecution asserted, an opportunity to "turn a quick-buck" on a frail man. Defense counsel also presented the defense in a state of confusion and unpreparedness, while at the same time subjecting himself to criticism and jokes, which could have only led to the complete loss of credibility with the jury. When these errors are considered in their totality, they

establish defense counsel was deficient performance in his performance and that Petitioner was prejudiced by this performance because there is a reasonable probability that, but for defense counsel's unprofessional errors, the result of the trial would have been different. Petitioner thus submits his counsel was ineffective in this regard.

Petitioner concedes that the Magistrate Judge did not agree with Petitioner's arguments and that the District Court accepted the recommendation that Petitioner's motion to vacate be denied. Petitioner also concedes that the Court of Appeals also denied Petitioner a COA. However, for purposes of these proceedings, Petitioner submits that he has made a substantial showing of the denial of his constitutional right to effective assistance of counsel such that reasonable jurists could debate whether his 28 U.S.C. § 2255 motion should have been granted and the issues presented in this claim are adequate to deserve encouragement to proceed further. Specifically, Petitioner asserts that whether counsel rendered ineffective assistance based on the totality of the circumstances is an issue which is debatable among reasonable jurists and adequate to deserve encouragement to proceed further. Petitioner therefore respectfully requests that this Honorable Court exercise its discretionary and supervisory powers and grant this petition for writ of certiorari so he may proceed with this claim before the United States Court of Appeals for the Fifth Circuit.

In sum, resolving doubt in favor of Petitioner, and based on a limited threshold inquiry concerning the merits of this claim, Petitioner respectfully submits his ineffective assistance of counsel claims are

debatable among reasonable jurists and adequate to deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 336; *Sonnier*, 161 F.3d at 944.

CONCLUSION

WHEREFORE, Petitioner, Vinnie Bilotto, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit denying the issuance of a Certificate of Appealability on Petitioner's ineffective assistance of counsel claims.

J. SCOTT SULLIVAN
Counsel of Record
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APPENDIX

INDEX TO APPENDIX

Order of Court of Appeals denying Petitioner's Motion for Reconsideration.....App. 1a-2a

Single-Judge Order denying request for COA.....App. 3a-5a

Order of Federal District Court Accepting Memorandum and Recommendation (denying COA).....App. 6a-7a

Memorandum and Recommendation of United States Magistrate Judge (recommending COA be denied).....App. 8a-11a

Judgment In A Civil Case Entered by Federal District Clerk.....App. 12a-13a

Order of Federal District Court Accepting Memorandum and Recommendation of United States Magistrate Judge (denying habeas relief).....App. 14a-15a

Memorandum and Recommendation of United States Magistrate Judge (recommending habeas relief be denied).....App. 16a-37a

Order of Court of Appeals denying relief on direct appeal.....App. 38a-47a

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 18 2009
CHARLES R. FULBRUGE III
CLERK

No. 08-51227

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

VINNIE BILOTTO

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

Before DAVIS, SMITH, and DENNIS, Circuit Judges.
PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is denied.

/s/	/s/	/s/
WED	JES	JLD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 10 2009
CHARLES R. FULBRUGE III
CLERK

No. 08-51227
USDC No. 5:08-CV-232
USDC No. 5:04-CR-343-ALL

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

VINNIE BILOTTO

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

ORDER:

Vinnie Bilotto, federal prisoner # 43468-180, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his convictions for mail fraud. Bilotto argues that the district court erred in dismissing on the merits his claims that his trial counsel rendered ineffective assistance by (1) failing to use meaningfully an opportunity to impeach government witness Karen Hathaway, (2) referring to bilotto as untruthful during closing arguments, (3) failing to introduce into evidence the fact that bilotto had purchased a 20-year life insurance policy on the insured, (4) failing to prepare and present an adequate defense, and (5) failing to render effective assistance under the totality of the circumstances.

No. 08-51277

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court's denial of federal habeas relief is on the merits, the prisoner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Bilotto has not made such a showing. Accordingly, his motion for a COA is DENIED.

/s/

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

FILED
JAN 30 2009
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By TM
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VINNIE BILOTTO,	§	
	§	
Movant,	§	**CAUSE NO.**
	§	**SA-08-CA-0232-OG**
	§	**[SA-04-CR-343-OG]**
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	
	§	
	§	
Respondent.	§	

ORDER ACCEPTING RECOMMENDATION OF MAGISTRATE JUDGE

Before the Court are the memorandum and recommendation of United States Magistrate Judge John W. Primomo (docket no. 301), and movant's objections. The Court has conducted an independent review of the record, a *de novo* review of the matters raised by the objections, and has reviewed the applicable law. See 28 U.S.C. § 636(b)(1); FED. R. CIV.

P. 72(b). The Court concludes that movant's objections lack merit, and they are OVERRULED. The memorandum and recommendation is ACCEPTED. It is further ORDERED that movant's § 2255 application for a certificate of appealability is DENIED.

SIGNED this 30 day of January, 2008.

/s/
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VINNIE BILOTTO,	*	
	*	
Movant,	*	**CAUSE NO.**
	*	**SA-08-CA-0232-OG**
	*	**[SA-04-CR-343-OG]**
	*	
v.	*	
	*	
UNITED STATES OF AMERICA,	*	
	*	
	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

In this motion to vacate sentence, filed pursuant to 28 U.S.C. § 2255, Vinnie Bilotto challenges his conviction and sentence for mail fraud, asserting that he received ineffective assistance of counsel at trial. Accepting the Memorandum and Recommendation of the undersigned, the District Judge denied the motion. Bilotto has filed a Notice of Appeal (docket no. 295) and an application for a certificate of appealability. (Docket no. 297). This Court is of the opinion his request should be denied.

Pursuant to 28 U.S.C. § 2253(c)(1)(B), an appeal may not be taken to the court of appeals from a final order in a § 2255 proceeding unless a circuit judge or district judge issues a certificate of appealability ("COA"). A COA may issue only if the applicant has

made a substantial showing of the denial of a constitutional right. **Title 28 U.S.C. § 2253(c)(2).** A substantial showing requires the applicant to demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. ***Slack v. McDaniel,*** 529 U.S. 473, 483-84 (2000).

In his § 2255 motion, Bilotto alleged that his attorney, Ray Taylor, rendered ineffective assistance by (1) by failing to meaningfully use the opportunity to impeach the government's key witness, Karen Hathaway, (2) by arguing to the jury that Bilotto was untruthful and could not be trusted, (3) by failing to introduce crucial evidence that Bilotto purchased a long-term policy because he believed he was investing in the long life of Donald Taylor, (4) by failing to effectively prepare and present the case at trial, and (5) based on the totality of the representation. He desires to raise the same arguments on appeal. Each of the claims was fully addressed in the initial Memorandum and Recommendation. Bilotto has not made a substantial showing of the denial of a constitutional right. Jurists of reason would not find the issues in this § 2255 motion to be debatable.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that Bilotto's application for a certificate of appealability be **DENIED.**

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this United States Magistrate Judge's Memorandum and Recommendation on all parties by

either (1) electronic transmittal to all parties represented by attorneys registered as a "Filing User" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Pursuant to Title 28 U.S.C. Section 636 (b) (1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the Clerk of Court and serve the objections on all other parties and the Magistrate Judge.*** A party's failure to file written objections to the proposed findings conclusions, and recommendations contained in this report shall bar the party from a ***de novo*** determination by the district court. ***See Thomas v. Arn***, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal th unobjected-to proposed factual findings and legal conclusions accepted by the

district court. ***Douglass v. United States Automobile Association***, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SIGNED December 30, 2008.

/s/

JOHN W. PRIMOMO
UNITED STATES MAGISTRATE JUDGE

FILED
OCT 29 2008
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

VINNIE BILOTTO

V. JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA

CASE NUMBER: SA-08-CA-223-OG
(SA04-CR-343-OG)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came on for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that, pursuant to the Court's order this date, this case is CLOSED.

10/29/08
Date

William G. Putnicki
Clerk

/s/ Robert F. Flaig
(By) Deputy Clerk

FILED
OCT 29 2008
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By TM
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VINNIE BILOTTO,	§	
	§	
Movant,	§	**CAUSE NO.**
	§	**SA-08-CA-0232-OG**
	§	**[SA-04-CR-343-OG]**
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	
	§	
	§	
Respondent.	§	

ORDER ACCEPTING RECOMMENDATION OF MAGISTRATE JUDGE

Before the Court are the memorandum and recommendation of United States Magistrate Judge John W. Primomo (docket no. 288), and movant's objections. The Court has conducted an independent review of the record, a *de novo* review of the matters raised by the objections, and has reviewed the applicable law. See 28 U.S.C. § 636(b)(1); FED. R. CIV.

P. 72(b). The Court concludes that movant's objections lack merit, and they are OVERRULED. The memorandum and recommendation is ACCEPTED. It is further ORDERED that movant's § 2255 motion to vacate sentence is DENIED. All pending motions, if any, are OVERRULED AS MOOT.

SIGNED this 28 day of October, 2008.

/s/
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VINNIE BILOTTO,	*	
	*	
Movant,	*	**CAUSE NO.**
	*	**SA-08-CA-0232-OG**
	*	**[SA-04-CR-343-OG]**
	*	
v.	*	
	*	
UNITED STATES OF AMERICA,	*	
	*	
	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

In this motion to vacate sentence, filed pursuant to 28 U.S.C. § 2255, Vinnie Bilotto challenges his conviction and sentence for mail fraud. (Docket nos. 274, 275). He asserts that he received ineffective assistance of counsel at trial. Having considered the motion, the government's response (docket no. 284), Bilotto's reply (docket no. 287), and the applicable law, the Court is of the opinion the motion should be denied.

Background

Bilotto was found guilty by a jury on October 25, 2005 of four counts of mail fraud in violation of 18 U.S.C. § 1341 for his role in procuring two "key person" life insurance policies. On April 13, 2006, he was sentenced to serve 15 months in prison on each count,

to be served concurrently, to be followed by a supervised release term of three years. (Docket no. 240). On appeal, Bilotto alleged: (1) insufficient evidence supported the verdict; (2) the district court improperly limited his ability to cross-examine witnesses; (3) the district court denied him a fair trial by disparaging his counsel in front of the jury; (4) the district court erroneously refused to give a good faith jury instruction; (5) the district court improperly admitted irrelevant and unfairly prejudicial evidence and (6) the cumulative effect of the errors made at trial, even if individually harmless, required reversal. His conviction was affirmed by the Fifth Circuit Court of Appeals. ***United States v. Bilotto***, 245 Fed.Appx. 410 (5th Cir. 2007). The motion to vacate sentence now before the Court was filed March 24, 2008.

Bilotto was convicted of using the mail to carry out a fraudulent scheme to collect proceeds of two insurance policies, one with Farmers New World Life Insurance Company ("Farmers") and one with Metropolitan Life Insurance Company ("MetLife"), after the death of the insured, Donald Taylor. Both Farmers and MetLife issued key person term life insurance policies which generally allow employers to insure key persons for up to five times their annual salary. Key persons are those individuals whose untimely death would cause a business to experience a measurable loss to continued profitable. Bilotto was the owner of business entities named Allstate Outdoor Displays and Allstate Property Management. According to the superseding indictment, Bilotto made materially false representations in the policy applications upon which Farmers and MetLife relied,

and he caused the mail to be used to submit the applications and to receive the policy proceeds.

Analysis

In this § 2255 motion to vacate sentence, Bilotto clams that his attorney, Ray Taylor, rendered ineffective assistance (1) by failing to meaningfully use the opportunity to impeach the government's key witness, (2) by arguing to the jury that Bilotto was untruthful and could not be trusted, (3) by failing to introduce crucial evidence that Bilotto purchased a long-term policy because he believed he was investing in the long life of Donald Taylor, (4) by failing to effectively prepare and present the case at trial, and (5) based on the totality of the representation.

To obtain habeas relief on a claim of ineffective assistance of counsel, the petition must demonstrate that his counsel was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant carries the burden of proving that counsel's representation fell below an objective standard of reasonableness. **Id.** at 688. He must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. **Id.** at 690. In reviewing counsel's performance, the Court makes every effort to eliminate the distorting effects of hindsight, and attempts to adopt the perspective of counsel at the time of the representation. **Id.** at 689.

An error by counsel, even if professionally unreasonable, must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. ***Strickland,*** 466 U.S. at 692. The

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. **Id.** at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. **Id.**

1. Impeachment of Hathaway

Bilotto first contends that Ray Taylor provided ineffective assistance by failing to meaningfully impeach the government's key witness, Karen Hathaway. She worked as an insurance agent for Farmers from November 1995 to October 2000. **Transcript,** Vol. 2 of 7, p. 160. According to Hathaway, Bilotto asked her about a key man policy for an individual who was very important to his business. **Id.,** pp. 164-65. He provided information for the application on Donald Taylor, including his responsibilities as "Operations Manager" and annual income of $50,000 as Bilotto's employee. **Id.,** pp. 165-71. Hathaway told Bilotto she needed to speak directly to Taylor to complete the health questionnaire. **Id.,** p. 173. She spoke to a man on the phone that she believed was Taylor at a number provided by Bilotto. **Id.,** pp. 174-75.

After the application was completed, Hathaway sent it to Bilotto who, with Taylor, signed the application and returned it by mail to Hathaway. **Transcript,** Vol. 2 of 7, pp. 178-79. After a medical examination, set up by Bilotto, was sent in and the premium was paid, the policy was issued. **Id.,** pp. 183-84, 187. In fact, Taylor had mental problems, abused alcohol and received Social Security disability benefits. **Id.,** pp. 5-6, 25. He cut yards for a living and earned about $20-$30 for that service. **Id.,** pp. 6, 98-99.

Bilotto testified that Hathaway sent him a blank application which he gave to Taylor with the understanding Bilotto would be taking out a life insurance policy on Taylor's life. **Transcript,** Vol. 5 of 7, pp. 904-05. He acknowledged that Taylor performed manual labor such as mowing lawns. **Id.,** p. 905. Bilotto denied that he provided any of Taylor's health insurance information to Hathaway for the application and denied misrepresenting anything as to Taylor. **Id.,** pp. 912, 915. In this § 2255 motion, Bilotto focuses on his trial attorney's alleged failure to adequately cross-examine Hathaway concerning the source of the information for the application. He points to an allegedly inconsistent prior statement made by Hathaway regarding this subject.

The matter was raised in a different context by Bilotto during his direct appeal when he complained that the District Court unreasonably limited and ultimately denied his attempts to impeach Hathaway with an allegedly inconsistent prior statement she made regarding whether Bilotto had helped her fill out the key person insurance application form. The Court of Appeals found that, while the District Court did restrict the flow of questioning regarding what Hathaway has previously said, the District Court gave Bilotto an opportunity to cross-examine Hathaway on her statement, which is all that was required. ***Bilotto,*** 245 Fed.Appx. at 412-13. In support of his claim of ineffective assistance of counsel, Bilotto notes that the Court of Appeals stated that "[d]efense counsel did not meaningfully use that opportunity" and referred to "the confusing way in which defense counsel questioned [Hathaway]." **Id.** at 413.

The allegedly inconsistent statement to which Bilotto refers was made during an interview of Hathaway by private investigator Jim McKay. During the conversation, Hathaway stated that she spoke to an individual who identified himself as Donald Taylor and that he provided "all the information that went on [the application] . . " **Transcript,** Vol. 3 of 7, pp. 236-37. Bilotto contends that statement is contrary to her trial testimony that Bilotto provided some of the information for the application. The record shows that Ray Taylor did attempt to impeach Hathaway with her prior statement to McKay.

First, Taylor sought to use the audio tape of the interview for impeachment. **Transcript,** Vol. 3 of 7, pp. 220-50. The District Court ruled that the transcript of the conversation between Hathaway and McKay would not be admitted but that Taylor could ask Hathaway any questions. **Id.**, pp. 250-51. On cross-examination, he did not ask Hathaway about the conversation with McKay. However, on re-cross, he specifically inquired about the conversation with McKay and Hathaway's statement that she filled out all the information on the application. **Id.,** pp. 348-49. In response to the District Court's inquiry, Hathaway acknowledged that she recalled the question by McKay about that subjects. **Id.,** p. 349. When Bilotto's attorney sought to ask more questions about the alleged inconsistency between Hathaway's conversation with McKay and her current testimony, the District Court indicated that Hathaway's statement was not inconsistent and that counsel needed to move on to another subject matter. **Id.**

When the government sought to have the entire transcript of the Hathaway/McKay conversation

played for the jury, Taylor and co-counsel Louis Correa stated they wanted to offer only the page showing an inconsistent statement by Hathaway. **Transcript,** Vol. 3 of 7, p. 355. In response to re-cross, the government again asked Hathaway who provided the information for the application. **Id.,** pp. 358-359. She again testified that Bilotto, the owner of the policy, verbally gave her the information for the front page of the application, and Donald Taylor answered the health questions over the phone. **Id.** When Ray Taylor attempted to re-emphasize that Hathaway stated that Donald Taylor had provided all the information that wen on the application, the District Court indicated that Hathaway had explained that the word "all" referred to the medical portion of the application. **Id.,** p. 361. The District Court terminated that line of questioning by stating that the jury could decide what Hathaway meant. **Id.**

Contrary to Bilotto's claim, his trial attorney did attempt to impeach Hathaway with her prior statement to McKay. He tried to admit the transcript of the conversation between Hathaway and McKay. He specifically asked Hathaway about her conversation with McKay and Hathaway's statement that she filled out all the information on the application. When Bilotto's attorney sought to ask more questions about the alleged inconsistency, the District Court indicated that Hathaway's statement was not inconsistent and that counsel needed to move on to another subject matter. After the government obtained Hathaway's explanation about the alleged inconsistency, Bilotto's attorney attempted to re-emphasize that Hathaway stated that Taylor had provided all the information on the application. At

that point, the District Court terminated that line of questioning. Clearly, Bilotto's attorney made several efforts to impeach Hathaway with the statement made to McKay.

Bilotto contends that Ray Taylor was ineffective in his cross-examination of Karen Hathaway. That Court rendered no such finding. With due respect to the dicta in the opinion of the Court of Appeals, this Court finds that the questioning of Hathaway by Bilotto's attorney regarding the allegedly inconsistent statement was not confusing. The record does not support a conclusion that he failed to meaningfully use the opportunity to impeach Hathaway with the statement she made to McKay. Counsel's performance in this regard was not deficient.

Additionally, Bilotto has not shown prejudice. He has never established that Hathaway's statement to McKay was, in fact, inconsistent. Hathaway repeatedly explained that Bilotto provided the information over the phone for the first part of the application, as the owner of a key man policy always does, and that Donald Taylor (or someone who identified himself as Taylor) supplied the information over the phone for the medical portion of the application. Nothing in Hathaway's conversation with McKay or that Bilotto's attorney could have asked about that conversation changes that fact. Bilotto has failed to prove that he was prejudiced by his attorney's performance in cross-examination of Hathaway regarding the source of information for the insurance application.

2. Counsel's References to Bilotto's Lack of Veracity

Next, Bilotto complains that his attorney rendered ineffective assistance during closing arguments by arguing to the jury that Bilotto was untruthful and could not be trusted. He refers to the following statement made by his attorney:

> You cannot trust–you see, I admit there is suspicion about what went on in this case and I admit that you-all may be suspicious of whether Vinnie may have been untruthful at times. I know you-all are concerned about that; me too.

Transcript, Vol. 7 of 7, p. 37. Later, counsel stated:

> I know there's doubt in your mind about whether Vinnie Bilotto was completely candid in this. And I understand, that's perfectly understandable, there's been evidence that he wasn't.

Id., p. 49. Finally, Bilotto cites to the following:

> I understand that there's a doubt in your mind about Vinnie, I understand. I mean you've heard evidence that hurts him, frankly. I understand that.

Id., pp. 50-51. Bilotto argues that there can be no conceivable trial strategy for a lawyer to argue that his client is a liar. He contends that, particularly in a case of alleged fraud, statements such as those made by counsel were prejudicial.

As noted in ***Yarborough v. Gentry,*** 540 U.S. 1, 6 (2003), cited by Bilotto, closing arguments should sharpen and clarify the issues for resolution by the trier of fact. However, which issues to sharpen and how best to clarify them are questions with many

reasonable answers. **Id.** Judicial review of a defense attorney's summation is therefore highly deferential–and doubly deferential when it is conducted through the lens of federal habeas. **Id.** In ***Yarborough***, defense counsel referred to his client as a "bad person, lousy drug addict, stinking thief, jail bird." The Supreme Court determined that, by candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. **Id.** at 9.

As the government argues, it is necessary to evaluate the comments of Bilotto's attorney in the context of his entire closing argument. In his affidavit, Ray Taylor points out that Bilotto did not do well on cross-examination. **Government's response,** exh A, p. 5. Taylor states he was hesitant and appeared to be deceptive. He believed that the jury would have concerns about Bilotto's truthfulness, and he attempted to address those concerns in his closing argument. However, Taylor asserts he did not focus on that matter. Instead, he states that he argued that the government's witnesses were untruthful. Taylor indicates that this strategy has proven successful in past cases.

Review of the transcript is consistent with Taylor's explanation. **Transcript,** Vol. 7 of 7, pp. 35-37. He pointed out that Karen Hathaway admitted lying on the application. **Id.** at 38. Taylor argued that she possessed a motive for lying because of personal financial problems and because she was afraid of the consequences, knowing she had lied on the application. **Id.** at 39-40, 46-47, 49. He emphasized that Bilotto was presumed to be innocent and that it was the

government's burden to prove him guilty beyond a reasonable doubt. **Id.** at 43-45. Taylor told jury that the Hathaways were the ones with the expertise in insurance underwriting to perpetrate such a scheme. **Id.** at 38-39, 48. He noted that while the jury may have some doubt regarding Bilotto's candidness, they could have no doubt regarding the "unethical, illegal, false statements act" of the Hathaways. **Id.** at 49-50. Again, he emphasized that the jury may have a doubt about Vinnie but they must have the gravest doubt about the Hathaways. **Id.** at 50-51. He tied the meaning of proof beyond a "reasonable doubt"–proof of such a convincing character that a juror would be willing to act upon it without hesitation in the most important of the juror's own affairs–by asking if the jurors would be willing to buy insurance from the Hathaways and concluding they would not. **Id.** at 51.

Also, Bilotto fails to note that, while pointing out apparent credibility problems with Bilotto's testimony, Taylor stated that "not one soul said other than Vinnie Bilotto is an honest man, that he had a good reputation for honesty. That was 100% of the testimony. And I respectfully submit that's just inconsistent with this crazy and complicated scheme." **Transcript,** Vol. 7 of 7, 47-48. The Court finds that Taylor's references to suspicions about Bilotto's credibility did not serve as argument to the jury that he was untruthful. Taylor attempted to minimize discrepancies, which he believed were quite apparent to the jury, while focusing on the untruthfulness of the government's witnesses and the failure of the government to prove Bilotto guilty beyond a reasonable doubt. Contrary, to Bilotto's claim now, Taylor noted during final argument that witnesses

portrayed Bilotto as honest, which would be inconsistent with his guilt on the charges against him. Applying a strong presumption that Taylor's conduct was not deficient, eliminating the distorting effects of hindsight, and attempting to adopt the perspective of counsel at the time of the representation, the Court concludes that Taylor's closing argument falls within the wide range of reasonable professional assistance. Bilotto has also failed to establish that he was prejudiced by the references of which he complains in Taylor's final arguments.

3. Failure to Admit Crucial Evidence

Bilotto claims that his attorney rendered ineffective assistance by failing to introduce crucial evidence that Bilotto purchased a 20-year policy because he believed he was investing in the long life of Donald Taylor. According to Bilotto, it was the government's theory that he sought to insure the life of an individual he knew was ill and would soon be deceased. Bilotto contends that evidence that he bought the longer term policy, rather than a policy for five or ten years, rebuts the notion of his intent to defraud. In his affidavit, Bilotto states that, in preparation for trial, he told Ray Taylor that he chose a 20-year policy so he would have a longer term of coverage for Donald Taylor. **Petitioner's Memorandum**, exh. A.

In his affidavit, Ray Taylor denies that Bilotto ever told him that he selected a longer term policy for Donald Taylor. **Government's Response**, exh A, p. 6. If this were a crucial fact, an evidentiary hearing would be necessary to resolve this dispute. However, it is not. While, as Bilotto contends, requesting a long term policy provides some evidence that he anticipated

that Donald Taylor would be a long term employee, evidence regarding his actual status and income are the critical misrepresentations that establish fraud. Undisputed evidence showed that Donald Taylor was not an operations manager and did not earn $50,000 per year. The length of the policy has no bearing upon these material facts.

Also, as Ray Taylor points out, the defensive strategy was to show that the Hathaways convinced Bilotto to buy a life insurance policy on Donald Taylor because they needed the sale and commissions. **Government's Response,** exh A, p. 6. His cross-examination of Karen Hathaway and his closing argument are consistent with this theory. Ray Taylor also stated that he and Bilotto agreed that the defense would be that he relied upon the advice and recommendation of the Hathaways, who were knowledgeable about insurance policies, as to which policy would be best for him. **Id.** It was part of the defense that Bilotto relied to his detriment because the policy selected by the Hathaways was now being characterized as being fraudulent.

The Court finds that Ray Taylor did not err in failing to elicit evidence concerning Bilotto's purchase of a long term policy. It was not consistent with the defense agreed upon by Bilotto. Also, as noted above, Hathaway testified that Bilotto asked her about a key man policy and told her that Donald Taylor was his Operations Manager, earning $50,000 per year. Bilotto acknowledges that Donald Taylor was not a key man, was not his Operations Manager, and was not paid $50,000 per year. The length of the policy is only tangentially relevant, if at all, to the issues of fraud.

For the same reason, Bilotto cannot demonstrate prejudice.

4. Failure to Effectively Prepare and Present a Defense

Bilotto again cites to language in the opinion of the decision of the Court of Appeals referring to "the confusing way in which defense counsel questioned [Hathaway]." ***Bilotto***, 245 Fed.Appx. at 413. He suggests that the District Court became frustrated with Ray Taylor and took over the questioning regarding completion of the application. Bilotto also notes that during cross-examination of Laree Brown, the government's insurance claims specialist, the District Court once again took over questioning regarding a question on the claim form directed to life insurance policies with other companies on Donald Taylor's life. Bilotto suggests that by pushing the Court's patience to the limit, Ray Taylor's performance fell below an objective standard of reasonableness. He further refers to several instances in which Ray Taylor announced that he had hearing problems.

Bilotto also cites to Ray Taylor's failure to call a witness who could testify to the review process for policy applications, as suggested by the District Court. He blames Taylor's performance for the District Court's decision to limit cross-examination of other key witnesses. Bilotto states that Taylor declared he was fatigued and apologized for his mistakes. He cites to the District Court's criticism when Taylor ran out of witnesses for the day, **Transcript,** Vol. 4 of 7, p. 557. Finally, Bilotto claims that Taylor admitted he did not know the facts of the case or the defense. **Id.,** Vol. 2 of 7, p. 63, Vol. 4 of 7, p. 576.

The isolated incidents to which Bilotto cites do not indicate that he was deprived of effective assistance at trial. As discussed above, the record does not support a conclusion that Taylor's cross-examination of Karen Hathaway was confusing. He elicited admissions of her falsehoods on the application and evidence of her motive for securing the policy application from Bilotto and Donald Taylor. The fact that the District Court asked questions of Hathaway and Brown do not demonstrate Taylor's deficient performance. Questioning by a trial court is quite common in federal court and is often an effort to "get to the point" more quickly than the examining attorney and move the case along. Such efforts are not always welcome by trial attorneys who have their own reasons or motives for questioning witnesses in a particular manner. The fact that a trial judge may temporarily and on occasion take over questioning of a witness is certainly not evidence of ineffective assistance of counsel. As counsel for the government noted, the District Court's questioning of witnesses in this case occurred rarely, and was not limited to defense counsel's questioning. During examination of Karen Hathaway, the District Court interrupted the prosecutor when he repeated questions she previously answered and took over questioning regarding completion of the application. **Transcript,** Vol. 3 of 7, pp. 329-31, 333, 340-41.

Bilotto does not explain how Taylor's fatigue, hearing problems, or allege mistakes impacted his case. He also fails to explain how Taylor's performance caused the District Court to limit cross-examination of other key witnesses. Conclusory allegations of ineffective assistance of counsel are not

sufficient to raise a constitutional issue. ***United States v. Demik***, 489 F.3d 644, 646 (5th Cir. 2007); ***Miller v. Johnson***, 200 F.3d 274, 282 (5th Cir. 2000). Bilotto suggests that Ray Taylor should have called a witness who could testify to the review process for policy applications, as suggested by the District Court. Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. ***Coble v. Dretke***, 444 F.3d 345, 350 (5th Cir. 2006). To prove prejudice from counsel's failure to call certain witnesses, a petitioner must identify those witnesses and establish, by affidavit or otherwise, what those witnesses would have testified to at trial. ***Sayre v. Anderson***, 238 F.3d 631, 635-36 (5th Cir. 2001). Bilotto has failed to meet his burden of proving that Taylor erred in failing to call any particular witness to testify at trial.

Whether Taylor ran out of witnesses to call for the day is not indicative of ineffective assistance. It happens every day in many trials. Bilotto's claim that Taylor did not know the facts of the case is not supported by the record. His assertion that Taylor acknowledged he admitted not knowing the defense is inaccurate. The statement to which Bilotto refers is, again, taken out of context. As the government notes, the discussion occurred at the bench and concerned the extent to which defense counsel would be allowed to cross examine Ernest Hathaway, Jr. **Transcript,** Vol. 4 of 7, pp. 571-77. Exactly what Taylor meant is difficult to discern. However, it is clear that he did not mean that he and his co-counsel Louis Correa were presenting no defense to the charges against Bilotto.

Earlier in the conversation, Correa repeatedly refers to "defendant's position" and "the defensive theory."

As previously noted, the record establishes that Taylor's defensive strategy was to show that the Hathaways convinced Bilotto to buy a life insurance policy on Donald Taylor because they needed the sale and commissions. He and Bilotto agreed that the defense would be that Bilotto relied upon the advice and recommendation of the Hathaways, who were knowledgeable about insurance policies, as to which policy would be best for him. It was part of the defense that Bilotto relied to his detriment because the policy selected by the Hathaways was not being characterized as being fraudulent. Selecting a short statement out of context, as Bilotto has done, does not establish that Taylor was unprepared or failed to present a defense.

5. Cumulative Errors

Finally, Bilotto contends that the totality of errors committed by Taylor warrants relief from his conviction and sentence. As this Court believes that Taylor did not commit errors in his representation of Bilotto, this argument lacks merit. Taylor made several efforts to impeach Karen Hathaway with an alleged prior inconsistent statement. Taylor's references to suspicions about Bilotto's credibility may not have been the tactic employed by some counsel but "[t]his is precisely the sort of calculated risk that lies at the heart of an advocate's discretion." ***Yarborough***, 540 U.S. at 9. Tactical and strategic decisions of counsel, based on informed and reasoned practical judgment, will not be second-guessed. ***Ransom v. Johnson***, 126 F.3d 716, 721 (5th Cir. 1997).

Taylor's failure to introduce evidence about the length of the policy sought by Bilotto also was not error. It was inconsistent with the defense which Bilotto agreed to present and was only minimally relevant to the issues of fraud. Bilotto does not contest the primary misrepresentations in the insurance application regarding Donald Taylor's position and salary which demonstrate that fraud was committed. Finally, Bilotto has not shown that Taylor failed to effectively prepare and present a defense. The isolated incidents to which Bilotto cites in support of this claim neither singly nor in combination demonstrate attorney error. He has failed to show that Taylor and Correa failed to present the best defense under the facts and applicable law. Bilotto has not proven either deficient performance or prejudice. His claim of ineffective assistance of counsel is without merit.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that Bilotto's § 2255 motion to vacate sentence be **Denied.**

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this United States Magistrate Judge's Memorandum and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "Filing User" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Pursuant to Title 28 U.S.C. Section 636 (b) (1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written

objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the Clerk of Court and serve the objections on all other parties and the Magistrate Judge.*** A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a ***de novo*** determination by the district court. ***See Thomas v. Arn***, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal th unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United States Automobile Association***, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

It is so **ORDERED.**

SIGNED September 24, 2008.

/s/

JOHN W. PRIMOMO
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 18 2007
CHARLES R. FULBRUGE III
CLERK

No. 06-50587

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

VINNIE BILOTTO

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:04-CR-343-ALL

Before DAVIS, Chief Judge, and REAVLEY and SMITH, Circuit Judges.

PER CURIAM:[1]

Following a jury trial, Vinnie Bilotto was convicted of mail fraud in violation of 18 U.S.C. § 1341 for his role in procuring two "key person" life insurance policies. Bilotto appeals, contending that (1) insufficient evidence supported the verdict; (2) the district court improperly limited his ability to cross-examine witnesses; (3) the district court denied him a fair trial by disparaging his counsel in front of the jury; (4) the district court erroneously refused to give a good-faith jury instruction; (5) the district

court improperly admitted irrelevant and unfairly prejudicial evidence; and (6) the cumulative effect of the errors made at trial, even if individually harmless, required reversal. For the reasons that follow, we affirm.

1. To prove Bilotto committed mail fraud in violation of 18 U.S.C. § 1341, the Government had to show "(1) a scheme to defraud; (2) the use of the mail to execute that scheme; and (3) the specific intent to defraud." United States v. Harms, 442 F.3d 367, 372 (5th Cir. 2006) (quoting United States v. Bieganowski, 313 F.3d 264, 275 (5th Cir. 2002)), *cert. denied*, 127 S. Ct. 2875 (2007). Bilotto contends that the government failed to prove that he had the specific intent to defraud in that the definition of "key person"

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[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

provided at the trial was too vague to prove his belief and fraudulent intent. When reviewing for the sufficiency of the evidence, however, this court must affirm the conviction "if a rational trier of fact could have found that the evidence established the elements of the offense beyond a reasonable doubt." United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Bilotto cannot meet that burden.

While several key witness did not recite the same exact words when defining "key person," a common thread ran through each definition: a key person was essentially somebody who did valuable work for the company and whose death would cause the company a significant loss. Moreover, the exact meaning of the phrase is a red herring: regardless of whether Bilotto knew the definition, a rational jury could have found that Bilotto had an intent to defraud. Karen Hathaway testified that in filling out the insurance form, Bilotto provided her information about Donald Taylor. Taylor's mother, among others, provided evidence indicating that this information was obviously false. Likewise, testimony indicated that Bilotto had taken out a fraudulent key-person insurance policy on another employee, Gilbert Edge. A rational jury could properly infer from this, and other

pieces of evidence, that Bilotto had the requisite criminal intent.

2. Bilotto next contends that the district court violated his Sixth Amendment rights by limiting cross-examination of Hathaway. "Alleged violations of the Confrontation Clause are reviewed *de novo,* but are subject to harmless error analysis. United States v. Bell, 367 F.3d 452, 465 (5th Cir. 2004). If no Sixth Amendment violation exists, this court reviews the district court's limitation on cross-examination for abuse of discretion. United States v. Townshend, 31 F.3d 262, 267-68 (5th Cir. 1994). Here, the district court was within its discretion in its handling of Hathaway's cross-examination.

Bilotto complains that the district court unreasonably limited and ultimately denied his attempts to impeach Hathaway with an allegedly inconsistent prior statement she made regarding whether Bilotto had helped her fill out the key person insurance form. While the district court did restrict the flow of questioning regarding what Hathaway had previously said–in part, because of the confusing way in which defense counsel questioned her–the district court gave Bilotto an opportunity to cross-examine Hathaway on her statement, stating that defense counsel could ask Hathaway about "anything

under the sun." Defense counsel did not meaningfully use that opportunity. But the opportunity is all that the law requires. See Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985) (per curiam)

No. 06-50587

("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."). Bilotto claims that he could not ask Hathaway questions about her prior statement because the district court said he could not "use" the transcript of the statement. But the district court seemed to be referring only to actual physical use of the transcript as opposed to *questions* about what she had said. The jury was also able to hear Hathaway's explanation of what she claimed she meant.

While the district court might be faulted for stating in front of the jury that the prior statement was not inconsistent with the witness's testimony, that statement was harmless. The district court warned the jury that except for his instruction "on the law," they should "disregard anything [he] may have said during the trial in arriving at your own findings as to the facts." See United States v. McClatchy, 249 F.3d 348, 358 (5th Cir. 2001) (holding that a

judge's improper comments in front of the jury could be rendered harmless error by an instruction similar to the one given here). Additionally, as noted above, defense counsel was provided an opportunity to explore Hathaway's allegedly inconsistent statement.

Finally, Bilotto asserts that the district court improperly limited the cross-examination of three other witness. After reviewing the record, we have determined that the district court did not improperly limit cross-examination of those witnesses.

3. Bilotto also contends that the district court denied him a fair trial with its treatment of his counsel. In reviewing claims of judicial misconduct, this court's role is to "determine whether the judge's behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial." United States v. Bermea, 30 F.3d 1539, 1569 (5th Cir. 1994). The proceedings must be viewed as a whole to determine whether the judge's actions "amount to an intervention that could have led the jury to a predisposition of guilty by improperly confusing the functions of judge and prosecutor." Id. Bilotto's argument primarily rests on several sarcastic comments the district court made in front of the jury that were allegedly humiliating for defense counsel,

thus making it impossible for the attorney to win the respect of the jury.

The district court's conduct did not deprive Bilotto of a fair trial. Overall, the trial was conducted in an impartial manner. The challenged exchanges are minor, isolated incidents, which seem to have been taken as a joke at the time. And while the district court, at times, interjected himself into a witness's cross-examination, his questions were aimed at clarifying the witness's testimony.

4. Bilotto next argues that the district court erred when it refused all three of his good-faith jury instructions. As a threshold issue, however, the parties disagree on the standard of review: Bilotto contends that he objected to the exclusion of his requested good-faith defense instruction and the standard of review is therefore abuse of discretion. United States v. Chaney, 964 F.2d 437, 444 (5th Cir. 1992). The Government counters that Bilotto failed to preserve error and thus plain-error is warranted. Even assuming that Bilotto did preserve error, he cannot show that the

district court abused its discretion in denying his requested good-faith charges.

This court has already held that the failure to give a good-faith instruction is not reversible error as long as the defendant has the opportunity to

argue good faith to the jury and a good-faith instruction is substantially given to the jury through an instruction on the meaning of the word "knowingly." Id. at 444-46. Here, Bilotto was never denied an opportunity to argue good faith to the jury. The jury was also essentially given a good-faith instruction through the definition of "knowingly," which the district court defined as doing something "voluntarily and intentionally, not because of mistake or accident" and through the definition of "intent to defraud," which the district court defined as an "intent to deceive or cheat someone."

5. Bilotto further argues that the district court erred when it admitted testimony from Taylor's mother that she did not have sufficient funds from a life insurance policy to pay for her son's funeral expenses. Bilotto argues that the information should have been excluded because it was irrelevant, and even if it were relevant, any purported probative value was substantially outweighed by the testimony's unfairly prejudicial effects. See Fed. R. Evid. 403. In determining whether the district court erred, this court reviews evidentiary rulings for an abuse of discretion, although that review is heightened in criminal cases. United States v. Anderson, 933 F.2d 1261, 1267-68 (5th

Cir. 1991). The district court did not abuse that discretion here.

Taylor's mother's statement that she could not afford a funeral was relevant to show that Taylor himself did not have much money, supporting the Government's contention that Bilotto lied about Taylor's alleged $50,000 annual salary. See Fed. R. Evid. 401 (defining relevant evidence as "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probably than it would be without the evidence" (emphasis added)). Furthermore, the district court was within its discretion to determine that the unfair prejudice did not substantially outweigh the statement's probative value.

6. Finally, Bilotto contends that the cumulative effect of the multiple errors alleged resulted in an unfair trial, requiring reversal. There were not multiple errors. See United States v. Villarreal, 324 F.3d 319, 328 (5th Cir. 2003).

AFFIRMED.